

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1932.

No. 5807

278

VIRGINIA B. PHELPS, PLAINTIFF IN ERROR,

vs.

JOEL T. BOONE ET AL.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 8, 1932.

PRINTED DECEMBER 5, 1932.

*Argued Oct. 4, 1933.
Full Court*

Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5807

VIRGINIA B. PHELPS, PLAINTIFF IN ERROR,

vs.

JOEL T. BOONE ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5807.

VIRGINIA B. PHELPS, Plaintiff in Error,

vs.

JOEL T. BOONE et al.

1 Municipal Court of the District of Columbia.

No. 250,261.

VIRGINIA B. PHELPS, Plaintiff,

vs.

JOEL T. BOONE et al., Defendant-.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

2 In the Municipal Court of the District of Columbia.

Bill of Particulars.

Filed May 20th, 1932.

Defendants to Plaintiff, Dr.

	Parts.	Labor.
Straighten hood		\$6.00
“ left front fender.....		1.50
1 Left rear fender.....	\$6.00	1.40
Straighten left rear body panel.....		5.00
“ “ bumperette		1.25

	Parts.	Labor.
1 Left rear hub cap.....	.50	
1 " " axle.....	3.00	1.40
Align left rear rim.....	...	.50
1 Left door.....	24.00	
1 " " glass.....	6.00	4.00
1 " " upholst-ry.....	6.00	
3 " " hinges.....	2.10	
Straighten and repairs left top drip mould- ing.....		1.75
Align front wheels.....		.55
Recharge Battery.....		1.00
Straighten right rear fender.....		4.00
Equalize and adjust brakes.....		1.75
	\$47.60	\$30.10

The foregoing repairs were made necessary because defendants, by their agent, so negligently operated and controlled an automobile in which they were riding on the right of April 19, 1932 on the Baltimore-Washington Boulevard between Muirkirk and Beltsville as to run into and upon the automobile of plaintiff which was parked along the side of said Boulevard, which aforesaid charges for repairs are fair and reasonable.

(Signed)

EDWIN C. DUTTON,
Attorney for Plaintiff.

*Entry of Finding of Fact, with Notation of Exceptions and
Notice of Intention to File Petition for Writ of Error.*

July 1, 1932.

Mins. 68, p. 66: Come now the parties hereto and thereupon this cause being heard and submitted, the court finds in favor of the defendants. Exception noted by the plaintiff.

3

Entry of Judgment.

July 8, 1932.

Mins. 68, p. 92: It appearing under rule of court that judgment on the finding in this cause should be entered, it

is so ordered. Wherefore it is considered that the plaintiff take nothing by this action, that defendants go hence without day, be for nothing held, and recover of plaintiff their costs of defense.

4 In the Municipal Court of the District of Columbia.

No. 250,261.

VIRGINIA B. PHELPS, Plaintiff,

vs.

JOEL T. BOONE et al., Defendants.

Bill of Exceptions.

Be it remembered, that at the trial of this case before Judge Nathan Cayton, which began and ended on the 1st day of July, 1932, the following is the substance of all the testimony taken and exceptions reserved thereto on behalf of plaintiff.

Plaintiff, **Virginia B. Phelps**, and her husband, **Everett Phelps**, and **Mr. and Mrs. Carow** testified that they were returning to Washington on the Baltimore-Washington Boulevard about midnight April 19th, 1932, and had stopped their automobile, which was being driven by Mr. Phelps, to fix the window, and were about 2½ feet off the hard surface; that is, the car was a little more off the road than on the road. Mr. Phelps was standing beside the automobile, he heard a roaring noise, looked to the right and saw a large car bearing down upon him. He made a jump to get in the car he was driving but before he could do so the car in which defendants were riding struck plaintiff's car, tore off the door and did other damage, and hurt Mr. Phelps. The car in which defendants were riding went on for about 200 feet and crossed over the highway. Defendants returned to plaintiff's car and Dr. Boone was asked how it happened, and said the only way he could account for it was that "my chauffeur was nodding" and when he called to him he jerked his head up, and that he, Dr. Boone, grabbed the wheel and tried to avoid hitting Mrs. Phelps' car, but it was too late; had he not grabbed the wheel and turned it to the left, he did not know what might have happened. All lights on plaintiff's car were

lighted. Dr. and Mrs. Boone and Gen. and Mrs. Patterson had been to Baltimore to attend the opera and were returning to Washington when the collision occurred. Dr. Boone was sitting beside the driver. The damage to plaintiff's car was substantially proven by repairman.

Plaintiff rested.

5 Defendant, **Dr. Boone**, testified that he was a Captain in the Medical Corps, United States Navy, and had been assigned as physician to the White House since March 6, 1929, and was on duty twenty-four hours a day; that wherever he might be it was known to the White House, and he is subject to attendance and call momentarily, for which purpose facilities have been afforded to make that possible. A Packard automobile, registered in the name of the United States Navy, had been assigned to him by the Navy Department, at the direction of the White House, for his use so that he could be in touch with the White House at all times, and that an enlisted man of the U. S. Navy, named Arthure Prettyman, had been assigned as chauffeur for this car. On the night of April 19, 1932, he had occasion to be away from the White House and had made arrangements with the telephone switchboard operator as to where he might be located at any moment; and that late that evening he was returning from Baltimore in the same Packard automobile, driven by Prettyman, and Gen. and Mrs. Patterson and Mrs. Boone were also in the automobile.

On cross-examination, Dr. Boone testified that on the afternoon of April 19, 1932, he called the garage and had this Packard car driven by Prettyman, sent to him at the White House; from there he went to his home for Mrs. Boone, from there to the home of Gen. Patterson, and from there Prettyman drove them to the home of a physician in Baltimore where they all had dinner, and after dinner went to the opera in his friend's car, Prettyman following with the Packard and waited outside, and after the opera they started for Washington in the Packard driven by Prettyman. No directions were then given the chauffeur, Prettyman.

Defendant rested. Plaintiff dismissed her suit as to defendant Patterson.

Court found for the defendant and against the plaintiff and plaintiff excepted and gave notice of intention to file petition in the Court of Appeals for writ of error.

Plaintiff moves the Court to sign and seal this her bill of exceptions, which is accordingly done, now for then, this 19th day of September, 1932.

NATHAN CAYTON, [SEAL.]
Judge.

EDWIN C. DUTTON,
Attorney for Plaintiff.
J. J. WILSON,
Attorney for Defendants.

[Endorsed:] No. 250,261. Virginia B. Phelps, plaintiff, vs. Joel T. Boone et al., defendants. Bill of exceptions. Edwin C. Dutton, Insurance Building, Washington, D. C., attorney for plaintiff.

6 *Assignment of Errors.*

Filed August 18, 1932.

1. The Court erred in finding against plaintiff and for the defendant.

2. The court erred in giving a judgment against the plaintiff and in favor of the defendant.

3. The Court erred in finding defendant Boone not liable for the negligence which directly caused the damage in this case.

(Signed)

EDWIN C. DUTTON,
Attorney for Plaintiff.

Service of copy of the foregoing Assignment of Errors acknowledged this 18th day of August, 1932.

(Signed)

J. J. WILSON,
Attorney for Defendants,
Asst. U. S. Atty., D. C.

Designation of Record.

Filed August 18, 1932.

The Clerk will please include in the Transcript of Record the following:

1. Bill of Particulars.
2. Entry of Finding of Fact, with notation of exceptions and notice of intention to file petition for Writ of Error.

3. Entry of Judgment.
4. Bill of Exceptions.
5. Assignment of Errors.
6. This Designation.

(Signed)

EDWIN C. DUTTON,
Attorney for Plaintiff.

Service of copy of the foregoing Designation of Record acknowledged this 18th day of August, 1932.

(Signed)

J. J. WILSON,
Attorney for Defendants,
Asst. U. S. Atty., D. C.

7 Filed Aug. 1, 1932, Municipal Court, District of
Columbia.

UNITED STATES OF AMERICA, ss:

The President of the United States,

To the Honorable Nathan Cayton, Judge of the Municipal
Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Virginia B. Phelps, plaintiff, and Joel T. Boone and Robert U. Patterson, defendants, No. 250,261, a manifest error hath happened, to the great damage of the said plaintiff, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 1st day of August, in the year of our Lord one thousand nine hundred and thirty-two.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*

Allowed by

D. LAWRENCE GRONER,
*Associate Justice of the Court of
Appeals of the District of Columbia.*

8 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 8, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. 250,261, wherein Virginia B. Phelps, is plaintiff, and Joel T. Boone, et al., are defendants, as the same that remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of October, 1932.

[Seal Municipal Court, District of Columbia.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: In error to the Municipal Court of the District of Columbia. No. 5807. Virginia B. Phelps, plaintiff in error, vs. Joel T. Boone et al. Court of Appeals, District of Columbia. Filed Oct. 8, 1932. Henry W. Hodges, Clerk.

FOR MR. JUSTICE GRONER

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

FEB 1 5 1933

~~Henry H. Hodges~~

CLERK

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1932.

—
No. 5807.
—

VIRGINIA B. PHELPS, *Plaintiff in Error*,

vs.

JOEL T. BOONE, ET AL.

—
BRIEF IN BEHALF OF PLAINTIFF IN ERROR.
—

✓ EDWIN C. DUTTON,
CARL J. NUTTER,
Attorneys for Plaintiff in Error.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1932

No. 5807

VIRGINIA B. PHELPS, *Plaintiff in Error*,

vs.

JOEL T. BOONE, ET AL.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

STATEMENT OF CASE

This case arose in the Municipal Court of the District of Columbia where plaintiff in error sued the defendant in error for damages to her automobile in the amount of \$77.70.

About midnight, April 19, 1932, plaintiff in error, with her husband and Mr. and Mrs. Carow, were returning from Baltimore on the Baltimore-Washington Boulevard and had stopped her automobile, which was being driven by her husband, about 2½

feet off the hard-surfaced pike. Mr. Phelps was standing on the running-board fixing the window of the car when he heard a roaring noise, looked and saw the car in which defendant in error was riding bearing down upon him. He tried to get back in his wife's car but before he could do so, the car in which the defendant in error was riding struck the car of plaintiff in error and did the damage as set out in the Bill of Particulars. The car in which defendant in error was riding went about 200 feet and crossed over the highway. When defendant in error and one of his companions, General Patterson, returned to the scene of the collision, Doctor Boone was asked how it happened, and he said he could not account for it only that "my chauffeur was nodding," and when he, Doctor Boone, called to him, he jerked his head up and Doctor Boone grabbed the wheel and tried to avoid hitting plaintiff in error's car. Doctor Boone turned the wheel of his car to the left and if he hadn't, he said he did not know what might have happened. Plaintiff in error's lights were on. Doctor and Mrs. Boone and General and Mrs. Patterson had been to Baltimore to attend the opera and Doctor Boone was sitting beside the driver of the car.

Doctor Boone testified that he was a captain in the Medical Corps, U. S. Navy, assigned as physician to the White House since March 6, 1929, and was on duty twenty-four hours a day. He was subject to attendance and call momentarily and it was known to the White House wherever he might be. The Packard automobile in which he and his companions were riding on this evening was registered in the name of the U. S. Navy and had been assigned to him by the Navy Department at the direction of the White House for his use so that he could be in touch with the White

House at all times, and an enlisted man of the U. S. Navy, one Arthur Prettyman, had been assigned as chauffeur. On the night of this collision, he had occasion to be away from the White House and had made arrangements with the telephone and switchboard operator as to where he might be located at any moment, and late that evening he was returning from Baltimore in the Packard automobile driven by Prettyman.

On cross-examination, Doctor Boone testified that on the afternoon of April 19, 1932, he called the garage and had the Packard car, driven by Prettyman, sent to him at the White House. From there he went to his home for Mrs. Boone and from there to the home of General Patterson and from there to the home of a physician in Baltimore where they all had dinner, and from there they all went to the opera house in his friend's car, Prettyman following in the Packard, and after the opera in Baltimore, they started for Washington in this car driven by Prettyman. "No directions were *then* given the chauffeur, Prettyman."

ERRORS RELIED UPON

The Trial Court erred in finding the defendant Boone not liable for the negligence which directly caused the damage in this case.

ARGUMENT

The first thing we find in this case is a captain in the Medical Corps of the U. S. Navy being driven by an enlisted man in the U. S. Navy, who was referred to by the Captain as "my chauffeur."

There can be no doubt from the record (R. 3-4) that Mrs. Phelps' car was damaged through the

grossest sort of negligence. Taking Doctor Boone's own word for it, which is not contradicted, that "my chauffeur was nodding" and that when he, Doctor Boone, called to him, he jerked up his head, is proof positive that the chauffeur was asleep while driving a high-powered Packard car on a wide thoroughfare. Mrs. Phelps' car was parked about half off the hard surface of the boulevard and that there was ample room to pass, there can be no doubt. Her lights were lighted so that her car could be seen and the very fact that it was not seen would positively indicate that Doctor Boone's account of the accident was correct—the chauffeur was asleep. It will be noticed that Doctor Boone himself had hold of the wheel at the time of the collision because it is testified that he said so and it is not contradicted by him or anyone else. That the car was going very rapidly can be assumed from the fact that Mr. Phelps "heard a roaring noise" and the further fact that it went 200 feet and crossed over the highway before stopping. This brings us, then, to the discussion of the real point in this case as to whether or not Doctor Boone should be held liable for the negligence, indeed, gross negligence, of the chauffeur who was driving this car at this time.

We have examined the cases of *Newbold v. Harman*, 26 W. L. R. 808, and *Guild v. Brown*, 1 Pac. Rep., (2nd Series) 528, also *Helm v. Washington*, 5 Pac. Rep., (2nd Series) 53, but we do not agree with the conclusions arrived at in those cases.

In the *Guild v. Brown* case above, it appears that Brown, the enlisted man and chauffeur, was directed to drive Admiral Washington to the Bohemian Grove Club. No order was given by the Admiral, nor was Brown directed in any way by him as to where he

should drive. And when Brown was detailed to drive Admiral Washington to the Bohemian Grove Club, he at the same time was instructed to return home when he had delivered the Admiral at the Club. The Court of Appeals of California, not the Supreme Court of that State, in deciding this case, seemed to rely upon the case of *Billig v. Southern Pacific Co.*, 189 Cal. 477, and quote the following from that case:

“It would appear, therefore, to be the rule in this State that, when a master hires out, under a rental agreement, the services of an employee for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality and the negligence of the servant must be held to be that of the owner, and not that of the hirer of the instrumentality.” (Citing cases.)

It will be noted that the rule in California is there stated, whereas, if I correctly understand it, the rule here is different as laid down by this court in the *Western Marine and Salvage Co.* case, hereafter referred to. Then, too, the facts are quite different in that in the California case, a man was detailed to do a specific thing and return, whereas here, Doctor Boone himself called the garage and had the Packard car and the driver sent to him at the White House,

and from there on, directed the driver where to go.

We think the basic principle of law as laid down by this court in the case of *Western Marine & Salvage Co., a corporation, v. William Ball*, 59 App. D. C., 208; 58 W. L. R., 135, controls this case. In that case, the electro-magnet crane was the property of the Western Marine and Salvage Co., and the operator was an employee of that company, but at the time of the accident, both the crane and the operator were engaged on Simon's work. The fact that this Packard automobile belonged to the United States Government and the operator thereof was an enlisted man of the United States Navy is not controlling. The question is, who had the right to control and direct the conduct of the chauffeur at the time of this collision? It is our contention that the chauffeur at the time of this accident was not engaged in work for the United States Government, but was engaged in work peculiarly and exclusively for Doctor Boone. We can find no statute which authorizes or directs that an automobile and driver be furnished the physician to the White House to go on a purely pleasure tour, so that, when Doctor Boone called the garage and had this car sent to him and directed that he be driven to his home, and then directed that he be driven to the home of General Patterson, and again directed that he be driven to a certain address in Baltimore, Maryland, and then directed that this car follow him to the opera house in Baltimore, that the chauffeur of this automobile was under the control and direction of Doctor Boone and engaged in work for Doctor Boone and therefore Doctor Boone is by law responsible for his negligence resulting in damage to another. Doctor Boone testified on cross-examination (R. 4) that after dinner they went to the opera in

his friend's car, Prettyman following with the Packard and waited outside, and after the opera they started for Washington in the Packard, driven by Prettyman. "No directions were *then* given the chauffeur, Prettyman." It is reasonable to presume that when Doctor Boone and his companions started from Baltimore to return to Washington, that he may not have said to the chauffeur, "Take us back to Washington," but certainly before and when he left Washington, he directed the chauffeur to go to his home and then to General Patterson's home and then to the home of his physician friend in Baltimore and then to the opera house. During this period he certainly was directing the chauffeur and the chauffeur was certainly under his control, and engaged in his work, and he continued under the direction and control of Doctor Boone returning from Baltimore to Washington. The uncontradicted testimony is, (R. 3) that Doctor Boone admitted at the time of the accident that Prettyman was his chauffeur, but about three months had elapsed between the time of the accident and Doctor Boone's testimony in court, and even then he was not willing to say more than that he did not give directions to the chauffeur after the opera. But suppose Doctor Boone had directed the chauffeur to take him and his guests to the Southern Hotel for dinner after the opera, would anyone believe for a moment that the chauffeur would say, "No, I am an enlisted man of the United States Navy and instead of taking you to the Southern Hotel, I propose to take you to Philadelphia." In the first place, Doctor Boone was an officer of the United States Navy and Prettyman was an enlisted man of the United States Navy and bound to obey legal orders of his superiors, and in the second place, he was then

and there under the civil control of Doctor Boone and no-one else.

In the Western Marine & Salvage Co. case, this court quoted with approval the rule in 55 A. L. R., 1263, 1264, which is as follows:

“In determining who is liable for the negligence of a servant in the general employment of one person, but who at the time of the injury complained of was assisting an independent contractor, the proper test seems to be, whose work was being performed, and who had the power to control and direct the servant in the performance of that work.”

We contend that even if Prettyman was generally as an enlisted man in the employ of the United States, nevertheless, at the time of this accident, Doctor Boone had the power to control and direct him and he was in the performance of the work of Doctor Boone and no-one else. In the case of *Murray v. Currie*, L. R. 6, C. P. 24, Brett, J., said:

“But I apprehend it to be a true principle of law that if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor.”

In *Standard Oil Co. v. Parkinson*, 152 Fed. 681, the court said:

“The test of one's liability for the act or omission of his alleged servant in his right and

power to direct and control his imputed agent in the performance of the casual act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, "Respondeat superior" in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged because in such a case there is no superior to respond."

In the case of *Philadelphia Coal Co. v. Barrie*, 179 Fed. 50, the court said, it is a rule universally recognized by the courts that while one may be in the general service of another, yet he may with respect to particular work be transferred with his own acquiescence to the service of a third person in such a way that he becomes the servant of that person with all the legal consequences of the new relationship.

In *Callahan v. Sharp*, 27 Hun. 85, the court said, it may be stated for a general rule that where the relation of superior and subordinate exists, the maxim "respondeat superior" has application coextensive with the relation. Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts, committed during such temporary employment by another.

The rule, that where one person lends or hires a servant to another for a particular employment, the servant must be dealt with as the servant of the man to whom he is lent or hired, although he remains the general servant of the person who lent or hired him, was followed in these cases:

Parkhurst v. Swift, 31 Ind. App. 521;
Johnson v. Boston, 118 Mass. 114;
Kimball v. Cushman, 103 Mass. 194;
Clapp v. Kemp, 122 Mass. 481;
Anderson v. Boyer, 156 N. Y. 93;
Higgins v. Western Union Tel Co., 156 N. Y. 75.

In *Rosen v. Diesinger*, (Pa.) 158 Atl. Rep., 561, Diesinger stored his car in the garage of Hossack. Hossack permitted his employees to deliver cars to homes when they were not busy. Wife of Diesinger phoned to have the car delivered to her apartment and Combs, an employee of Hossack, started to make the delivery and en route, because of his negligence, ran into and injured plaintiff, Rosen. The question arose as to whose servant Combs was at the time of the accident. Held that Combs was the servant of Diesinger and not of Hossack, and the court said:

“Even though Hossack in loaning Combs to the defendant thereby secured the valuable asset of good will of the defendant and her husband as appellant suggests, that fact would not justify a court in declaring as a matter of law that Combs was the servant of Hossack at the time of the negligent act.”

The court cited *Jimmo v. Frick*, 255 Pa. 353, 99 A, 1005, 1006, which said:

“It is clear, we think, that, while Gannon (the alleged driver) was in the general employment of the automobile Company, he was the servant of the defendant as long as he had charge and was operating the latter’s car on the morning of the accident. A person may be in the employment and pay of another person and yet not necessarily make the latter the master and re-

sponsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct.”

(Huddy Encyclopedia of Automobile Law.)

Sec. 119. Driver furnished by owner; borrowed vehicle. Generally. In the case of the loan of a vehicle, liability is not imposed on the owner merely because the driver of the machine is in his general employ. (Citing cases.) The master is not ordinarily liable for negligence of his servant when acting under the control of another person and engaged solely in the private business of such person. (Citing cases.) Servants who are employed and paid by one person may nevertheless be ad hoc the servants of another in a particular transaction. (Citing cases.) The test of liability is generally the control of the driver at the time of the particular occasion under investigation; if the owner has the control; he may be liable, if not, the person injured should look to the bailee. (Citing cases.)

In the case of *Dippel v. Juliano*, 152 Md. 694, at 699, the court said:

“It is difficult to formulate any sounder test for determining whether at the time of the accident the chauffeur was the employee of the owner or the borrower than that of the power of control and direction. . . The only difficulty about the rule, and it is a real difficulty, is to determine what is meant by ‘control.’ Ordinarily it means the power to govern, dominate, direct, or supervise in some respect the conduct of another, but the difficulty arises in attempting to define the extent or degree of dominion necessary to con-

stitute the 'control' which the borrower must have over a servant loaned to him before he becomes responsible for his acts, as the word is used in cases applying the rule. Evidently full dominion and control is not necessary, for that would imply the right to hire and discharge, and that is nowhere regarded as essential, while the mere right to point out and direct the servant as to the details of the work and the manner of doing it, leaving to the servant or his general employer the right to determine what work he shall do and what means he shall employ to do it, ordinarily is not enough. But where the work to be done is the borrower's work, and a part of his business, and he has the power and authority to direct when and where and how it shall be done, and where the work is not within the scope of the general employment of the servant, it may fairly be said that so far as that work is concerned he is under the control of the borrower and that the latter will be responsible for his negligent acts. *Standard Oil Co. v. Anderson*, 212 U. S. 218."

It is urgently, though respectfully, submitted that the Trial Court should be reversed.

EDWIN C. DUTTON,
CARL J. NUTTER,
Attorneys for Plaintiff in Error.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP 20 1933

Henry H. Stodges

No. 5807

CLERK

**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1932

VIRGINIA B. PHELPS, PLAINTIFF IN ERROR

v.

JOEL T. BOONE ET AL.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA

BRIEF FOR DEFENDANT IN ERROR

LEO A. ROVER,

United States Attorney,

JOHN J. WILSON,

Assistant United States Attorney,

RALPH E. DAY,

Attorney, Judge Advocate General's Office, Navy,

Attorneys for Defendant in Error.

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5807

VIRGINIA B. PHELPS, PLAINTIFF IN ERROR

v.

JOEL T. BOONE ET AL.

*IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT
OF COLUMBIA*

BRIEF FOR DEFENDANT IN ERROR

While the "Statement of Case" appearing in the brief of plaintiff in error is substantially correct, there are several omissions therein of facts disclosed by the bill of exceptions; and it is therefore respectfully suggested that the court refer to the bill of exceptions itself for the evidence, for it consumes no more space in the transcript of record (pp. 3 and 4) than plaintiff in error's statement in her brief.

QUESTION INVOLVED

The sole question involved is this: Whether a situation, where an automobile, owned by the Gov-

ernment, and provided by the Navy Department at the direction of the White House for the use at all times of a Naval officer, assigned as physician to the White House, the chauffeur thereof being an enlisted man in the United States Navy, was at the time of the accident (admitted, *arguendo*, to have been caused by the chauffeur's negligence) being used by such Government official (on duty and subject to call at all times) in returning home from the opera, creates the relationship of master and servant between that official and the chauffeur of the automobile so as to render the former liable for the latter's negligence?

ARGUMENT

The plaintiff in error contends in the situation set forth above that the relationship of master and servant does exist and that, therefore the rule or doctrine of *respondeat superior* applies. To sustain such contention, plaintiff in error would create an analogy between the present case and instances where a person lends or hires a servant to another for a particular employment; that is to say, where a master lends or hires, temporarily and for a particular purpose, his servant to another, under whose immediate control he is for the time being and whose work he is doing, the "special" master, so called, and not the general employer, will be responsible for the servant's torts, committed during such temporary employment. Such an analogy cannot properly be made.

It was shown at the trial that Captain Boone, a naval officer (Medical Corps), was on duty at the White House twenty-four hours a day; that he was subject to attendance and call momentarily wherever he might be; that for the purpose of expeditiously responding to any call made upon him while away from the White House a Packard automobile was, at the request of the White House, assigned by the Navy Department for Captain Boone's use; and that Prettyman, an enlisted man in the United States Navy, was ordered by the Navy Department to act as chauffeur of said automobile. Captain Boone's orders did not permit him to operate said automobile—that function, under lawful orders of the Navy Department, pertained exclusively to Prettyman. In operating the said automobile the evening of April 19, 1932, Prettyman was, therefore, in the performance of his official duties, and in using the Packard automobile said evening Captain Boone was obeying orders.

The cases relied upon by plaintiff in error to sustain her proposition contain three essential elements: (1) the master temporarily lends or hires his servant to another; (2) the servant must be under the immediate control of the other person; and (3) the servant must be doing the work of the other person. If these prerequisites, or any one of them, do not exist, liability does not affix to the borrower or "special employer". No fault is found by the defendant in error with this statement of the law, but obviously, when the rules thus relied upon

are applied to the peculiar circumstances of the case at bar, it is found that the evidence does not satisfy any of them, with the result that the doctrine insisted upon is not applicable to the defendant in error. It is the contention of the defendant in error that at all times the chauffeur was the servant of the United States (Navy), his master; and that at no time was he, nor could he be, the servant of defendant in error. *Newbold v. Harmon*, 26 W.L.R. 808; *Guild v. Brown*, 1 Pac. (2nd) 528; *Helm v. Washington*, 5 Pac. (2nd) 53.

Paraphrasing the language of the District Court of Appeal, First District, Division One, of California in the case of *Guild v. Brown*, *supra*, it seems elementary that no liability can attach to the defendant in error unless it can be shown that there was some privity of individual relationship between him and the chauffeur Prettyman.

The case of *Guild v. Brown*, *supra*, presents a situation in which the factual similitude to the case at bar is amazing. While it is readily admitted that this case was not decided by the court of last resort of the State of California, it is submitted that its logic is so sound, and its reasoning so clear, that it should be a very persuasive precedent in this instance. In order to avoid the case as an authority, the plaintiff in error, in effect, assigns three grounds for disregarding the opinion. In the first place it is stated that her counsel do not agree with the conclusions reached therein. Secondly, it is urged that the decision is based upon *Billig v.*

Southern Pacific Company, 189 Cal. 477, 209 Pac. 241, and that the *Billig case* is not in harmony with the law of this jurisdiction as enunciated by this Court in the case of *Western Marine and Salvage Company v. Ball*, 59 App.D.C. 208. A careful consideration of the *Billig case* fails to disclose that it lays down any doctrine which conflicts with the law of this jurisdiction; and if it should appear that any doubt is cast upon the matter by the excerpt from that decision which is quoted on page 5 of plaintiff in error's brief, such doubt is dispelled by the *per curiam* opinion of the Supreme Court of California on petition for rehearing (209 Pac. 245) in which it was stated:

* * * In the absence of direct evidence, or of any evidence, in the instant cases, from which it might be inferred that Harris, at the time and place of the collision, and with respect to the manner and method of operating and controlling the auto truck while in transit, had relinquished to another person his right of control over the driver of the truck, it must be inferred that he retained such control and as a consequence was liable.

It is apparent that the California Supreme Court recognized the same rule of law that was applied in the case of *Western Marine and Salvage Company v. Ball*, *supra*, but held merely that the evidence failed to disclose that the servant was under the control of the so-called "special employer."

As a third ground, plaintiff in error seeks to distinguish the *Guild-Brown case* from the case at bar by attempting to show that Dr. Boone gave minute and detailed directions to the chauffeur as to where the latter should drive him. It is submitted, should this be considered important, that according to the bill of exceptions no such directions were given (R. 4).

The California decision readily demonstrates the fact that the cases cited by the plaintiff in error are not in point. The California District Court of Appeal, in the following language, shows that none of the three elements, outlined above as being essential for the maintenance of the plaintiff in error's contention, is present in the peculiar circumstances of that case and of the case at bar:

Summing up the facts as coming within the rule of law stated, we find Brown, an enlisted man, bound to his employer, the Government, pursuant to his enlistment and the regulations governing, and assigned to chauffeur duty. He is ordered in the regular course of his employment to drive the car to Bohemian Grove and to carry as a passenger the admiral, the appellant herein. He is neither hired nor loaned to the appellant. He is specifically in the service of his master performing no service for appellant as master, but always within the terms of his own employment and subject only to the control of his own master throughout (p. 530).

Prettyman, as an enlisted man in the United States Navy, was a servant of the United States. To illustrate, it must be conceded that if the accident had occurred while Doctor Boone was responding to an emergency call from the White House, it would not be contended that he could be liable for the chauffeur's negligence. Captain or Doctor Boone was likewise a member of the same navy and a servant of the same master. Both were on duty at the moment of the accident in question. While both were amenable to the same authority, at the same time one was subordinate to the other, i.e., the enlisted man was subject to the orders of his superior officer. See Article 90, U.S. Navy Regulations, 1920, made pursuant to Section 1547, Revised Statutes (Title 34, U.S. Code, Section 591).

All persons in the Navy are required to obey readily and strictly, and to execute promptly, the lawful orders of their superiors.

As an enlisted man, Prettyman was bound to obey lawful orders, and in the course of his duties, was ordered to drive a Government automobile and to convey Doctor Boone as a passenger. These orders were not restricted to a particular place or for a particular time. Moreover, the orders to Doctor Boone permitted unlimited use of the automobile by him, and wherever and whenever Prettyman drove the car pursuant to those orders, he was performing services for his master, the United States. During the trip to Baltimore and return,

he was neither hired nor loaned to the defendant in error, but was still the servant of the Government.

In this connection, plaintiff in error states on page 7 of her brief that the uncontradicted testimony is that Doctor Boone admitted at the time of the accident that Prettyman was his chauffeur. The reference to the record (p. 3) discloses that Doctor Boone merely stated that "my chauffeur was nodding." This type of expression is a very commonplace one, and was undoubtedly so used in this instance. Manifestly, it was not intended to be an admission of the existence of a master-and-servant relationship between the parties mentioned.

Conceding the so-called personal nature of the journey, it is evident that, as an individual, Doctor Boone had no control or authority over the chauffeur with respect to his employment, his discharge, or his actions. All conduct on the part of the chauffeur during the trip, be it obedience or disobedience of any orders which Doctor Boone might have given, would be governed by the regulations of the service enforceable solely by the United States as master. Thus, it can be readily seen that whatever power of control Doctor Boone exercised over the chauffeur was that of a superior officer, but in no sense can it be said that this power was that of a master over a servant, because the power was governed entirely by naval regulations. Whether the defendant in error was on a trip strictly official, or whether he was on a personal errand, he would have the identical power of con-

trol and direction over the chauffeur, derived from their common master, the United States. This second so-called prerequisite to liability must presuppose a release of immediate control by the general master and an assumption of it by the "special employer." Such is not possible in the instant case. See *Moss v. Chronicle Publishing Co.*, 201 Cal. 610; 258 Pac. 88, 90; 39 Corpus Juris, Section 1462, page 1275.

As a third requirement, it is necessary that Prettyman was doing the work of Doctor Boone, and not of the United States. The plaintiff in error maintains that Doctor Boone was engaged on a pleasure trip at the time, and that therefore Prettyman was working entirely for him. In addition to what has been stated above with respect to this, it is submitted that Prettyman could not, in the operation of the Government automobile under the circumstances herein involved, be the servant of both the United States and Doctor Boone at the same time; and therefore, in driving the defendant in error back to Washington on the evening in question Prettyman, thus still doing the work that he was ordered to do by the United States as his master, namely, operating the means of keeping Doctor Boone in reasonable contact with the White House twenty-four hours a day, was the Government's servant and hence not Doctor Boone's. Neither was on leave of absence, nor in any sense did either assume the status of a civilian. *Guild v. Brown, supra.*

CONCLUSION

It being demonstrated that the peculiar circumstances of the case at bar do not fit the rules which plaintiff in error has referred to as furnishing a basis for liability on the part of defendant in error, it is respectfully submitted that no relationship of master and servant exists in the case at bar between Doctor Boone and chauffeur Prettyman to justify the application of the doctrine of *respondeat superior*; and, therefore, the judgment of the Municipal Court finding for the defendant was without error and should be affirmed.

Respectfully submitted.

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